

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re)	
)	Bankruptcy Case
ROBERT L. FERRIS and REGINA FERRIS,)	No. 99-31577HDM
)	
Debtors.)	Chapter 7
)	
ROBERT L. FERRIS and REGINA FERRIS,)	Adversary Proceeding
)	No. 99-3201DM
Plaintiffs,)	
)	
v.)	
)	
SALLIE MAE SERVICING CORPORATION;)	
TEXAS GUARANTEED STUDENT LOAN)	
CORPORATION,)	
)	
Defendants.)	
)	

MEMORANDUM DECISION

Trial was held in this student loan dischargeability action on November 3, 1999. Plaintiff Robert L. Ferris ("Robert"), an attorney admitted to practice before this court, appeared in propria persona and on behalf of his wife, Regina E. Ferris ("Regina"), who did not appear personally. Defendant Texas Guaranteed Student Loan Corporation ("TGSLC") appeared and was represented by Marcia E. Gerston, Esq.; Defendant Educational

1 Credit Management Corporation ("ECMC") appeared and was
2 represented by Mirian Hiser, Esq.

3 Having considered the testimony and evidence presented, as
4 well as the arguments of counsel, the court determines that the
5 student loans which are the subject of this action may not be
6 discharged under 11 U.S.C. § 523(a)(8).

7 I. FACTS¹

8 Robert is obligated to TGSLC on a consolidated Smart Loan
9 which had a principal balance as of the date of trial of
10 \$49,074.39, with a monthly payment obligation of \$374.24.

11 Regina is obligated to ECMC on a consolidated loan which had
12 a principal balance as of the date of trial of \$42,502.74, with a
13 monthly payment obligation of \$356.96.²

14 Robert is a 49 year old attorney and a Regina is a 46 year
15 old graduate of law school who has not become a member of any bar.
16 Robert and Regina have an 18 year old son, Marc, from Regina's
17 prior marriage and a 10 year old son; Robert has a son from a
18 prior marriage, who lives in Oregon with his mother.

19 For seven years Robert has practiced law in San Francisco as
20 an employee of another practitioner. As of the date of bankruptcy
21 (May 11, 1999) his average gross monthly wages were \$3,759; his
22 average net monthly wages were \$2,879. In at least one prior year
23 he earned more than his current annual income; he has also
24 received a modest bonus on one occasion. Nevertheless, for
25 purposes of this decision, the amounts set forth above are his
26 gross and net monthly wages. Robert also maintains a private
27 practice as a sole practitioner for some cases. Over the last
28 three years he has produced gross receipts that have averaged just

1 over \$700 per month. After consideration of taxes, etc., his net
2 self-employed income averages \$458 per month.

3 Regina works as a substitute teacher and earns average gross
4 wages of \$162 a month. The average combined monthly net income of
5 Robert and Regina is \$3,535.

6 Robert and Regina have current monthly expenses of \$4,518,
7 consisting of \$4,306 as set forth in their Second Amended Schedule
8 J filed July 30, 1999, plus an additional \$50 per month for
9 increased rent of their apartment in Burlingame, California,
10 \$39.90 for additional care of Regina's mother, Mrs. Luna, \$47 in
11 increased health insurance expenses, and \$75 for Marc's college
12 expenses. The expenses claimed by Robert and Regina include \$350
13 a month for charitable contributions paid as a tithe to Robert's
14 church. Robert is not prohibited from worshiping at a local
15 chapel of his church if he does not tithe but he is prohibited
16 from entering portions of his church's temple and from
17 participating in certain practices of the church if he does not
18 tithe.

19 II. DISCUSSION

20 The parties are in agreement that the standards for
21 determining dischargeability under 11 U.S.C. § 523(a)(8) are set
22 forth in United Student Aid Funds, Inc. v. Pena, 155 F.3d 1108
23 (9th Cir. 1998), namely (1) whether the debtor is able to pay a
24 student loan while maintaining a minimum standard of living
25 without undue hardship; (2) whether the debtor's financial
26 condition is likely to persist; and (3) whether the debtor has
27 made a good faith effort to repay the loan. The debtors have the
28 burden of proving each element. Peel v. Sallie Mae Servicing (In

1 re Peel), 240 B.R. 387, 392 (Bankr. N.D. Cal. 1999); Shankwiler v.
2 National Student Loan Marketing (In re Shankwiler), 208 B.R. 701,
3 705 (Bankr. C.D. Cal. 1997). TGS LC and ECMC do not question
4 Regina's and Robert's good faith, and thus this case turns on
5 whether the first two tests of Pena have been met. If one of the
6 two remaining requirements of the test is not satisfied, the
7 court's inquiry must end with a determination of
8 nondischargeability. Shankwiler, 208 B.R. at 705.

9 As to the minimum standard of living, the court accepts as
10 reasonable the expenses being borne by Robert and Regina with the
11 exception of the monthly tithing.³ Their choice to live in
12 Burlingame compared to some other area is not unreasonable, nor
13 are their routine household expenses for utilities, food,
14 clothing, personal expenses, etc. excessive. Their current
15 childcare expenses and the cost of assisting Regina's mother, Mrs.
16 Luna, are also reasonable and necessary.

17 While Robert has established that he is not capable of
18 earning any significant amount in addition to that as set forth
19 above, Regina has failed completely to carry her burden to
20 establish that she is unable to earn more than she does. Her
21 lifestyle choices are her own, but she cannot meet the first or
22 second prong of Pena without demonstrating that she is incapable
23 of earning more than she currently is and that that is not likely
24 to change. She has done neither. Her husband's argument that
25 another paralegal in his office earns \$15 per hour, and therefore
26 Regina could not earn more than that, fails as a matter of proof.
27 There is no evidence upon which the court could make a finding
28 that Regina's situation is likely to continue, or that her

1 financial situation is not the result of her (and her husband's)
2 own lifestyle choices. Accordingly, Regina has failed to
3 demonstrate a basis to declare her debt to ECMC nondischargeable.

4 As noted, Robert has carried his burden as to the extent of
5 his present earning capacity and its likely continuation into the
6 future without change. However, the court is unable to separate
7 the financial affairs of Robert and Regina to determine whether or
8 not Robert's paying TGSLC would be an undue hardship brought about
9 by circumstances not of his own making and not likely to change in
10 the future. Since Regina's debts cannot be discharged, the
11 monthly obligations to ECMC must be considered a necessary expense
12 even though Robert has no liability for that debt. Nevertheless,
13 Regina's failure to prove her earning capacity makes it impossible
14 for the court to determine whether the family expenses justify
15 discharging Robert's obligations in whole or in part. Since the
16 court looks upon Robert and Regina as a family unit, it is
17 necessary, therefore, to deny discharge of Robert's obligations as
18 well. Stated otherwise, the court will not use the
19 nondischargeability of Regina's obligations as a basis for
20 determining that Robert's obligations may be discharged. Had
21 Regina come forth with proof to establish the dischargeability of
22 her obligation to ECMC, the court might have had to decide whether
23 some portion of Robert's obligation to TGSLC could be discharged.⁴
24 Because she did not, Robert's case must fail as well.

25 III. DISPOSITION

26 Counsel for TGSLC and ECMC should submit one form of judgment
27 consistent with this decision, declaring all obligations of Robert
28 and Regina nondischargeable under 11 U.S.C. § 523(a)(8), and

1 awarding costs to defendants. Counsel should comply with B.L.R.
2 9021-1 and 9022-1.

3 Dated: November 24, 1999

4
5 Dennis Montali
6 United States Bankruptcy Judge

7 1. The following discussion constitutes the court's findings of
8 fact and conclusions of law. Fed. R. Bankr. P. 7052(a).

9 2. Robert also owes TGSLC a "Bar Study Loan" which he does not
10 seek to discharge. Regina also owes ECMC a "Perkins Loan" which
11 she does not seek to discharge.

12 3. Because the court will not discharge Robert's debt to TGSLC
13 for the reasons which follow, it need not decide whether tithing
14 is a necessary expense as a matter of law. However, Robert has
15 not established that tithing is required as a condition of his
16 worship; rather, the contrary has been shown. Robert's decision
17 to tithe in order that he may participate in certain procedures
18 and practices of his church would not likely justify discharging
19 his student loans on account of this voluntary practice.

20 4. Had that been the case the court would have been forced to
21 decide whether to follow United Student Aid Fund, Inc. v. Taylor
22 (In re Taylor) 223 B.R. 747 (9th Cir. BAP 1998) (bankruptcy court
23 may not partially discharge a student loan), or Brown v. Great
24 Lakes Higher Education Corp., et al. (In re Brown) 239 B.R. 204
25 (S.D. Cal. 1999) (contra).